

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-146-99

LRForbes

date:

to: District Director, New England District
Attn: E:PPQMB:Daronson

from: District Counsel, New England District, Boston

subject: Request for Advice - [REDACTED]
U.I.L. 6201.05-00 (Waiver of Restrictions)
U.I.L. 167.14-12 (Core Deposits Intangibles)

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This refers to your request for advice concerning Form 870 executed [REDACTED] by the taxpayer to resolve the tax years [REDACTED] through [REDACTED].

ISSUE

Whether Form 870, executed [REDACTED] by the taxpayer resolving inter alia the premium allocated to various intangibles acquired in its [REDACTED] acquisition of [REDACTED], was effective to resolve the issues in dispute or whether the taxpayer is entitled to the "global settlement" for intangibles.

CONCLUSION

Form 870 is effective upon delivery to the Service and may be immediately assessed. We recommend that the case be forwarded to the Joint Committee, as required, for processing and allow the taxpayer to pursue a claim for refund, as provided for by Form 870, after payment of any applicable tax. Furthermore, the Service's "global settlement" offer for acquired intangibles is predicated on an acquisition date of August 10, 1993, with a limited election for property acquired after July 25, 1991.

Based upon the facts of this case, the "global settlement" is not available to the taxpayer.

FACTS

On [REDACTED], [REDACTED] (taxpayer) paid a premium (\$ [REDACTED]) for certain acquired assets of [REDACTED]. The Service examined the acquisition with the assistance of the Service's Engineering Division. The engineer reviewed the transaction and proposed to disallow the taxpayer's allocation of \$ [REDACTED] of the premium to a Covenant Not to Compete. According to the engineer's report dated [REDACTED], the taxpayer agreed to this disallowance if the Service conceded that the taxpayer would be allowed to amortize the premium allocated to core deposits, or [REDACTED]% of the premium. On [REDACTED], the taxpayer executed Form 870 (Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment) resolving the issues, inclusive of the premium allocation for intangibles, for the tax years ended October 31, [REDACTED], December 31, [REDACTED], December 31, [REDACTED], and December 31, [REDACTED]. The tax year ended December 31, [REDACTED] generated a refund of \$ [REDACTED], requiring approval of the Joint Committee. The case was submitted to the Joint Committee on [REDACTED].

Prior to Joint Committee approval, the case was recalled to address the [REDACTED] issue. This issue was addressed with an examination report issued [REDACTED]. According to Revenue Agent Chuck Talamo, who requested the instant advice, this issue has been resolved and agreed to separately. The taxpayer, however, now alleges that the agreement on the intangibles' premium is not effective since the Service never accepted the agreement. The taxpayer now insists that the Service allow the "global settlement" which allows the amortization of a percentage of all intangibles. According to the request for advice, the engineer is opposed to the "global settlement" since the allocation of the premium was based upon a negotiated settlement.

Agent Talamo requests advice concerning the closing of this case based upon the taxpayer's verbal allegation that "no agreement" exists since the Service did not "accept" the agreement (Form 870). Agent Talamo proposes to consider the case as "unagreed" and allow the taxpayer to pursue his appeal rights.

DISCUSSION

Effect of Form 870

Form 870 (Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment) is a procedural device which has advantages for both the taxpayer and the Service. The taxpayer's consent to assessment of the deficiency in the waiver benefits the taxpayer in two ways: (1) a potential limitation on interest charges¹ and (2) the opportunity to contest the merits of the deficiency or overassessment by filing a claim for refund in a appropriate forum. The Service benefits since, unlike a Form 870-AD (Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment), the Service is not precluded from assessment of further deficiencies within the statutory timeframe.

The taxpayer alleges that since the Service did not "accept" Form 870, the agreement is not effective. Form 870, however, is effective immediately upon its delivery to the Service and may be assessed immediately. Smith v. Commissioner, T.C. Memo. 1991-412. Thus, Form 870 differs from other agreement forms such as a Form 870-AD or a closing agreement under I.R.C. § 7121, which are specifically conditioned upon acceptance by the Service with the acceptance effective on the "date it is accepted". In the instant case, the taxpayer executed Form 870 on [REDACTED]. If the settlement did not require Joint Committee approval of the large refund for [REDACTED], the Service could have immediately processed the agreement signed by the taxpayer.

Form 870 also differs from a closing agreement under section 7121, which is final and conclusive and does not allow the taxpayer to subsequently dispute the merits of the assessment. See C.H. Leavell & Co. v. Commissioner, 53 T.C. 426, 438-39 (1969). The taxpayer who executes a Form 870 is not precluded from contesting the merits of the assessment or overassessment but may pay any tax and file a refund suit. Smith v. Commissioner, T.C. Memo. 1991-412; Schneider v. Kelm, 137 F. Supp. 871 (D.Minn. 1956). In fact, Form 870 specifically states "[w]e will consider this a valid claim for refund or credit of any overpayment due you resulting from any decrease in tax and penalties shown above, provided you sign and file it within the period established by law for making such claim." Bauer v.

¹ If the Service fails to issue a notice and demand within 30 days after a Form 870 is filed, the waiver stops the running of interest on the deficiency until notice and demand is issued pursuant to I.R.C. § 6601(c). Smith v. Commissioner, T.C. Memo. 1991-412.

United States, 594 F.2d 44 (5th Circuit 1979) (Form 870 explicitly informs taxpayer that Service considers Form 870 as claim for refund if timely filed). In this case, we recommend that the case be forwarded, as required, to the Joint Committee for processing. If the taxpayer disputes the merits of the assessment, he can pursue a refund claim after the payment of any applicable tax.

Global Settlement

Section 197 provides for the amortization of acquired intangibles, inclusive of goodwill and going concern value, on a straight-line basis over a 15-year period from the month of acquisition. I.R.C. § 197(a). Section 197, effective for acquisitions after August 10, 1993, expanded the list of amortizable intangibles to include goodwill and going concern. See Treas. § 1.167(a)(3). The legislative history of section 197 indicates that Congress strongly urged the Service to utilize the principles of section 197 to resolve existing outstanding cases involving intangibles. H.R. Rep. No. 213, 103d Cong., 1st Sess. 696 (1993). The Service, therefore, offered a "global settlement" to resolve these outstanding cases under section 197 principles.²

Although section 197 was effective for intangibles acquired after August 10, 1993, Congress provided a limited election for property acquired after July 25, 1991. See P.L. 103-66, § 13261(g)(2)-(3). There is no indication from the legislative history that Congress intended to make section 197 retroactive, exclusive of the limited election for property acquired after July 25, 1991. In fact, the legislative history states that "no inference is intended that any deduction should be allowed in these cases for assets that are not amortizable under present law." H.R. Rep. No. 213, 103d Cong., 1st Sess. 696 (1993). In the instant case, the taxpayer acquired the intangibles on [REDACTED]. Based upon the facts of this case, the taxpayer would not be entitled to the "global settlement".

Based upon the above, we recommend that the case be

² We have been advised by Engineer Frank Schater that the "global settlement" was implemented by application of a percentage (determined by IRS charts) based upon the aggressive manner in which the taxpayer claimed an amortization deduction for intangibles, *i.e.*, the more aggressive, the lower the percentage. For example, if the taxpayer was allowed to amortize 25% of all intangibles (inclusive of previously unamortizable goodwill), he had to conceded the remaining 75% was non-amortizable.

forwarded to the Joint Committee, as required, for processing. The taxpayer can then pursue a claim for refund, as provided for by Form 870, after payment of any applicable tax. If you have any questions, please contact Attorney Louise Forbes at (617) 565-7860.

MAUREEN T. O'BRIEN
Assistant District Counsel

By: _____
LOUISE R. FORBES
Attorney